No. 13,959

IN THE

United States Court of Appeals

For the Ninth Circuit

VICTOR GOTHBERG, an Individual doing business as GOTHBERG CONSTRUCTION COMPANY,

Appellant and Appellee,

vs.

BURTON E. CARR, JANE DOE CARR, his wife, JACK AKERS and SHERMAN JOHNSTONE,

Appellees and Appellants.

On Appeal from the District Court for the Territory of Alaska, Third Division.

BRIEF FOR APPELLANT.

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JURISDICTION.

This is an appeal taken from a final judgment in favor of appellant filed and entered in the District Court for the Territory of Alaska, Third Judicial Division, on the 10th day of April, 1953. (R. 79.)

The District Court had jurisdiction in this proceeding by virtue of the provisions of Sections 53-1-1,

53-2-1, and 53-2-4, Alaska Compiled Laws Annotated 1949, and 48 U.S.C.A., Sec. 101.

The United States Court of Appeals for the Ninth Circuit has jurisdiction of said appeal by virtue of the provisions of Section 1291 of Title 28 of the United States Code, (as amended Oct. 31, 1951, c. 655, Sec. 48, 65 Stat. 726). This appeal is governed by Section 1294 of Title 28 of the United States Code (June 25, 1948, c. 646, 62 Stat. 930, as amended Oct. 31, 1951, 65 Stat. 727).

STATEMENT OF THE CASE.

On May 24, 1950, appellant entered into a contract (Appellant's Exhibit 1) with appellee (Burton E. Carr) for modification of an existing foundation located upon appellee's property. The scope of the work required under this contract was governed by Appellant's Exhibit 3. The agreed price of this work was $2,542.00, for which appellant sought recovery on his first cause of action stated in his amended complaint (R. 23).

While appellant was engaged in performance of the contract (Appellant's Exhibit 1) additional labor and materials were furnished in the installation of a furnace room at the rear of the building in accordance with a modified plan (Appellant's Exhibit 4-D). Appellant's charge for this additional work was $1,459.84, as set forth in his amended complaint (R. 24).

Then on September 19, 1950 appellant entered into a second contract (Appellant's Exhibit 2) with appellee for the erection of a building upon the foundation which had been completed. The contract (Appellant's Exhibit 2) included certain plans and specifications (Appellant's Exhibit 6) which governed the scope of Appellant's work. The completion date specified in the contract was December 1, 1950, but this date was extended at least until January 13, 1951, and appellee, without formal acceptance, entered into possession of the building on February 15, 1951. On that date, only minor finishing work remained to be completed. The contract price agreed upon was $38,450.00, all of which was paid by appellee except the sum of $3,845.00. This balance was the basis of appellant's third cause of action (R. 25-26).

During construction of the building, appellant furnished certain additional labor and materials in doing the rough-in carpentry in the showroom area of the garage. This additional work was done under Section SW1 of the contract (Appellant's Exhibit 2) and appellee was charged therefor the sum of $5,351.74, which is the sum for which appellant seeks recovery in his fourth cause of action.

In addition to the extra carpentry work done in the showroom, several changes and additions to the contract (Appellant's Exhibit 2) were approved by Lorn E. Anderson, appellee's agent and engineer. These changes and additions were set forth in Ap-

pellant's Exhibit 7. Appellant's claim for this additional work is contained in his fifth cause of action.

Appellant, upon his first cause of action, sought recovery of the contract price of $2,542.00. Upon his second, fourth and fifth causes of action appellant sought recovery upon the basis of the reasonable value of the labor and materials furnished. Upon this third cause of action, appellant relied upon substantial performance of the contract (Appellant's Exhibit 2).

Appellee denied liability upon all of appellant's claims and defended upon the ground of defective workmanship and cross-complained for damages alleged to have resulted therefrom.

The trial by jury resulted in the return of two verdicts. Verdict number one was in favor of the appellant in the amount of $14,250.82, and verdict number two awarded appellee the sum of $8,131.63. Upon these verdicts judgment was rendered in favor of appellant for $6,119.19. From this judgment, following motions by both parties, this appeal is taken.

ARGUMENT.

I.

APPELLANT, AS A MATTER OF LAW, WAS ENTITLED TO A DIRECTED VERDICT UPON HIS FIRST, SECOND AND FIFTH CAUSES OF ACTION SET FORTH IN HIS AMENDED COMPLAINT. MOTION FOR SUCH DIRECTION WAS MADE AT THE CLOSE OF ALL THE EVIDENCE (R-738-739).

Rule 50(a), Federal Rules of Civil Procedure, requires that such motion shall state the specific grounds therefor. This rule was complied with by appellant when he stated:

> "* * * upon the grounds that the defendant has not presented a valid defense to any of these causes of action and such evidence that the defendant has presented does not support the defenses pleased (pleaded) in his answer and cross complaint. There is no evidence before the Court or the jury on behalf of the defendant which refutes or denies that plaintiff is not entitled to recover." (R. 739.)

The foregoing specification of the grounds upon which said motion was based is sufficient. In the case of *Ryan Distributing Corporation v. Caley*, 147 F. (2d) 138, the Court, at page 140, held a similar specification sufficient under Rule 50(a).

In that case, the defendant challenged the ruling of the Court because the case presented a question of fact. The Court, admitting that a question of fact was involved, stated:

> "But in any question of fact, 'a verdict will normally be directed where both the facts and the inferences to be drawn therefrom, as sup-

ported by the overwhelming weight of the evidence, point so strongly in favor of one party or the other that the court feels reasonable men could not possibly come to a contrary conclusion'."

Ryan Distributing Corporation v. Caley, (Third C.C.A., 1945), 147 F. (2d) 138, Cert. Denied, 325 U.S. 859.

In another case in which the propriety of a directed verdict was discussed, this Court stated:

" 'The test, as to whether a directed verdict should be granted, is not whether the evidence brings conviction in the mind of the trial judge; it is whether or not the evidence to support a directed verdict as requested was so conclusive that the trial court in the exercise of a sound judicial discretion should not sustain the verdict for the opposing party.' O'Brien, Manual of Federal Appellate Procedure, 3d Ed., p. 15. Respecting the power of the trial court to grant or deny a motion for a directed verdict, the Supreme Court of the United States stated in Gunning v. Cooley, 281 U. S. 90, 91, 50 S. Ct. 231, 233, 74 L. Ed. 720, as follows:

'When on trial of the issues of fact in an action at law before a Federal Court and a jury, the evidence, with all the inferences that justifiably could be drawn from it, does not constitute a sufficient basis for a verdict for the plaintiff or defendant, as the case may be, so that such a verdict, if returned, would have to be set aside, the court may and should direct a verdict for the other party.'

> A mere scintilla of evidence is not enough to require submission of an issue to a jury."
>
> *Deere v. Southern Pac. Co.* (9th C.C.A. 1941), 123 F. (2d) 438, 440.

The Supreme Court, in a recent case, reviewing the duty of a Court with respect to directing a verdict, stated:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the Court should determine the proceedings by non-suit, directed verdict, or otherwise, in accordance with the applicable practice without submission to the jury; or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims." Citing cases, at page 479.
>
> *Brady v. Southern Ry. Co.,* 320 U.S. 476.

Appellant urges, upon the record, that the Court erred in denying the motion for directed verdicts upon the three specified causes of action. Upon those causes, appellant's right of recovery is supported by the weight of the evidence. This conclusion is supported most forcefully by appellee's testimony and admissions contained in the record (R. 312, 319, 320, 323, 358-367). In fact, this testimony of the appellee conclusively confirms appellant's right to recover: (a) $2,542.00 upon the First Cause; (b) $1,459.84 upon the Second Cause; and (c) $3,925.00

upon the Fifth Cause, all as reflected in Appellant's Exhibit 8 (R. 123), Exhibit 9 (R. 125) and Exhibit 11 (R. 128-132).

Denial of appellant's motion constituted reversible error.

II and III.

Points II and III of Appellant's Statement of Points (R. 82), for purposes of brevity, will be presented and discussed together.

POINT II CHALLENGES THE COURT'S RULING DENYING APPELLANT'S MOTION TO DISMISS THE APPELLEE'S CROSS-COMPLAINT (R-739).

POINT III URGES THAT ERROR OCCURRED WHEN THE COURT ENTERED JUDGMENT IN FAVOR OF THE APPELLANT IN ACCORDANCE WITH VERDICTS 1 AND 2 (R-79) FOR THE REASON THAT SAID VERDICTS WERE NOT SUPPORTED BY THE EVIDENCE AND WERE CONTRARY TO LAW.

Appellant's amended complaint (R. 23-27) presents five causes of action.

The first is based upon written contract, dated May 24, 1950 (Appellant's Exhibit 1) and seeks recovery of $2,542.00, the agreed price. The scope of the work required under this contract is governed by Appellant's Exhibit 3. Appellant's proof establishes conclusively that this contract was performed (R. 97), and that payment was not made either for the direct contract work or the extra work (R. 99-102). Appellee's testimony as to payment relates only to the contract dated September 19, 1950 (R. 213-216).

Appellant's second cause of action is based upon a claim for "extras" furnished in connection with revision of the furnace room at the rear of the building in accordance with Appellant's Exhibit 4-D. Appellant testified (R. 98-99) regarding the nature of the extra work that resulted from the modification. Appellant's Exhibit 5 was then admitted into evidence, and appellant testified he had not been paid any portion thereof (R. 101). Upon cross examination appellant testified that the boiler room costs were not included in the work required under the first contract (Exhibit 1) or the second contract (Appellant's Exhibit 2) (R. 139-146).

Upon cross-examination, appellee Carr admitted that the plans were revised to provide for construction of the boiler room inside, (R. 319), and that such work constituted an extra (R. 320). Carr then testified "I admit I owe him some—but not $1600.00". (R. 323.)

Witness Rivers (R. 547) estimated this work at approximately $1800.00.

Witness Anderson (R. 619) testified that appellant's charge therefor was reasonable.

Appellant's third cause of action (R. 25-26) seeks recovery of the balance due upon the main contract (Appellant's Exhibit 2). Appellant testified (R. 131-132) that all work upon the main contract was done, with the exception of minor finishing. Appellant testified (R. 707) that the contract was 99% com-

plete when appellee moved in and took possession of the building.

Appellant's fourth cause of action (R. 26) was based upon extra work performed at the request of appellee. This extra work consisted of additional carpentry work in the showroom and included the labor and materials furnished (R. 103-104). With respect to these extras, Appellant's Exhibit 6, Section SW1, specifically provided that interior finish work was not included within the terms of the main contract. (Appellant's Exhibit 2) (R. 185). Upon cross-examination, appellee Carr (R. 326-329) admitted that appellant was not required to do any finish carpentry. Upon further examination, appellee admitted (R. 334-335) that the cost of the rough inside carpentry in the showroom was about $5,500.00. Appellant's final claim, as set forth in the amended complaint (R. 26) for this work was $5,371.74.

The witness, Lorn E. Anderson, engineer, representing appellee, testified (R. 623-624) that a charge of $5,000.00 for this extra work would be fair and reasonable.

Appellant's fifth cause of action (R. 27) is based upon a claim for extras amounting to $3,925.00, which were furnished beyond the scope of the original contract (Exhibit 2). This claim is predicated upon change orders authorized by appellee's engineer, Lorn E. Anderson (Appellant's Exhibit 7). Appellant testified, in support of this claim, that all materials and labor were furnished (R. 113-128). This testi-

mony is corroborated by that of witness Anderson (R. 626-629) and also by the testimony of appellee (R. 358-366). Appellant's Exhibit 11 reflects the charges that were made for this extra work.

Appellee's cross-complaint should have been dismissed in accordance with appellant's motion (R. 739) at the conclusion of the evidence. Testimony of the appellant and appellee in relation to the issues raised by such complaint is conflicting. Appellant testified (R. 131) that the work was finished, except, as he said:

"There is some small items to be done. * * *"

He further testified (R. 707) that the contract (Exhibit 2) was approximately 99% complete. Nearly all of appellee's testimony relates to claims for alleged damages (R. 230-261).

Mr. Cupples, a witness called by both parties, testified (R. 274-275) that erection of the block walls had been done in accordance with accepted practices and that there had been no visible shifting.

Mr. Rivers testified (R. 531-533) that the blocks, being furnished by appellee, would be his responsibility. This same witness, in relation to the workmanship on the floor, testified (R. 550-552) that rehabilitation of the floor, if done one way, would cost $5,000.00 and if done another would cost about $3,500.00. Upon the issue of poor workmanship of the floor, witness Taylor (R. 600-603) testified that the rehabilitation work recommended by Mr. Rivers

(R. 550-552) could be accomplished at a price not exceeding $1.00 per square foot.

Appellee's proof in support of his cross-complaint was not sufficient to support Verdict number 2. The testimony in support of appellee's complaint is based upon an estimate of damages. The only possible evidence upon which the verdict might be sustained is that of Victor C. Rivers (R. 550-552). Neither the appellee, nor any of his other witnesses, corroborated this testimony in any manner.

In an analogous case, *Lease v. Corvallis Sand & Gravel Co.,* 185 F. (2d) 570, similar testimony was the basis of an award. This Court, at page 577, stated:

> "While what we have said is sufficient to dispose of the case and to disclose that no action existed, we believe we should further state that, in our opinion, even if a cause of action had been proven, there was no evidence upon which substantial damages could be awarded. The damages awarded were based exclusively upon an estimate of damage furnished by the witness, Gallagher, as a part of his testimony * * *" (p. 577).

This Court then held that the plaintiff in that action was not entitled to recover.

All of the testimony in support of appellee's cross-complaint is in the form of estimates, and therefore does not support the jury's verdict in favor of the appellee. See

J. P. Anderson Co. v. Gold Medal Candy Corp., (U.S.D.C., E.D. New York), 93 F. Supp. 909;

United States Naval Academy Alumni Assn., et al., v. American Pub. Co. (Court of Appeals, Maryland, 1950), 72 Atl. (2d) 735.

Appellant urges that the judgment (R. 79) of the District Court was contrary to the evidence before the Court. Upon all evidence, appellant was entitled to recover the entire amount namely $17,174.16, sought by his amended complaint (R. 23-28) rather than the sum of $14,250.82, awarded under Verdict 1.

Appellee's cross-complaint related not to items by way of set-off which were not, but should have been, performed under the terms of the original contract. Instead, appellee's cross-complaint is based upon the theory of damages for faulty workmanship and inferior materials. Appellant's proof as to his first, second, fourth and fifth causes of action of the amended complaint establishes adequately that the work was performed and that the amount charged therefor was reasonable. All of these causes of action are based upon the theory of quantum meruit.

Appellant's third cause of action is based upon the theory of substantial performance of the contract. The evidence in the record likewise sustains appellant's contentions upon this cause of action.

Thus, the District Court erred in entering judgment based upon the verdicts (R. 70-71) returned by

the jury. All that was required of appellant, to sustain his amended complaint, was a preponderance of the evidence.

Deutsch v. Hoge, et al. (U.S.D.C., N.D. Ohio), 94 F. Supp. 33, Aff'd 185 F (2d) 259;
17 *C.J.S.,* Sec. 603, page 1250.

Appellant urges that he sustained his burden of proof by a preponderance of the evidence. (R. 97, 99-102, 98-99, 131-132, 139-146, 147-152, 213-216, 319, 320, 323, 326-329, 334-335, 358-366, 428-429, 619, 623-624, and 707.)

A case in which a verdict was directed in favor of the plaintiff is that of *Princess Furnace Co. v. Virginia-Carolina Chemical Co.,* 215 F. 329. There a verdict for the plaintiff was directed upon defendant's breach of contract. The Court, at page 333, stated:

> "* * * In other words, the breach of the contract was established, and the liability of the furnace company to respond in damages followed the consequence."

The Court went on to say, referring to defendant's contentions:

> "But this is not a case, like an action for personal injuries, where the damages are uncertain because they depend upon the differing judgments which may be formed upon facts and circumstances, which it is the province of a jury to consider. This is an action for breach of contract, and, the breach having been proven, the damages of the injured party became a mere matter of cal-

culation from definite and certain data. Assuming that the furnace company defaulted, as we hold to be established, there was exact and uncontradicted proof both as to the aggregate losses of the chemical company and the date each loss occurred." (At page 333.)

Princess Furnace Co. v. Virginia-Carolina Chemical Co. (4th C.C.A. 1914), 215 F. 329.

Appellant contends that his proof upon each of his causes of action is sufficiently clear and uncontradicted to have justified the direction of a verdict in his favor.

In the case of *Galloway v. United States,* the Supreme Court, in an action upon a war risk insurance policy in which a directed verdict had been entered in favor of the government, discussed the duty of the trial Court with respect to directed verdicts and said:

"* * * Nor is the matter greatly aided by substituting one formula for another. It hardly affords help to insist upon 'substantial evidence' rather than 'some evidence' or 'any evidence' or vice versa. *The matter is essentially one to be worked out in particular situations and for particular types of cases. Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked."* At page 395.

Galloway v. United States, (Sup. Ct., 1942), 319 U.S. 372.

Appellant contends that appellee's defenses to this action were not sufficiently proven to prevent recovery of the full amount sought by appellant.

Furthermore, the jury reaching its decision, upon Verdict 1, is indicative that appellant established his case. Likewise, this verdict implies a finding that appellant endeavored in good faith to perform fully the terms of his contract.

The case of *Howard v. Dickson, et al.,* (S.C. Iowa, 1914), 149 N.W. 69, is a case analogous to the issues of this appeal. There plaintiff sued upon a contract for the digging of wells, the defendants defending upon a different contract and counterclaiming for materials furnished. The Court said:

> "* * * They disagree as to the terms of the contract and this disagreement was as to each contention, supported by some proof, requiring submission of the issue to the jury. The finding that plaintiff was entitled to recover necessarily, under the issues and instructions, was also a finding that plaintiff had established the contract as claimed by him."
>
> *Howard v. Dickson et al.,* (Sup. Ct., Iowa, 1914), 149 N.W. 69 at 70;
>
> *Morello v. Levakis* (Sup. Ct., Mass., 1936), 200 N.E. 271.

Upon the theory of these cases, appellant was entitled to a verdict or judgment for the full amount of his claims.

Appellee, during the course of the trial, urged that appellant was not entitled to recovery, inter alia,

because the contract was not completed in accordance with its terms. The testimony (R. 131-132, 707) supports appellant's theory of substantial performance in his third cause of action. Likewise, the record establishes that appellant was not promptly paid by appellee for the work as completed. Appellee, at no time until after this action was commenced, complied with the contract provisions (Appellant's Exhibit 2) relating to withholding payment for defective work. Appellant, therefore, did not abandon the contract and was entitled to refuse final completion and seek recovery upon his various claims.

In the case of *Phoenix Tempe Stone Co. v. DeWaard,* contentions there made by the defendant were similar to appellee's here. There this Court said:

> "* * * The facts pleaded bring the case within the rule that, where an act of the defendant renders complete performance of the contract impossible, the plaintiff may treat the act as a discharge from further performance, and may claim compensation for what has been done, and the damages which have been sustained."
>
> *Phoenix Tempe Stone Co. v. DeWaard,* (9th C.C.A., 1927), 20 F. (2d) 757 at 759;
>
> *United States v. Behan,* 110 U.S. 338, 28 L. Ed. 168;
>
> 3 *Elliott on Contracts,* 218.

Appellant, therefore, was entitled to recover in full the amount of $17,174.16, sought in his amended complaint (R. 27). Notwithstanding Verdicts 1 and 2, the District Court should have entered judgment in

that amount, less the amount of Verdict 2, if such verdict were allowed to stand.

IV.

THAT THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT, NOTWITHSTANDING THE VERDICTS OR IN THE ALTERNATIVE FOR A NEW TRIAL FOR THE REASONS:

(a) THE VERDICTS ARE INCONSISTENT.

(b) VERDICT NO. 1 IS CONTRARY TO THE EVIDENCE AND APPELLANT IS ENTITLED TO RECOVER THE FULL AMOUNT OF HIS CLAIM.

(c) VERDICT NO. 2 IS INCONSISTENT WITH VERDICT NO. 1, AND APPELLEE IS NOT ENTITLED TO RECOVER AGAINST APPELLANT.

The general rule applying to verdicts rendered under the Federal Rules of Civil Procedure is set forth in 9 Cyclopedia of Federal Procedure (3rd Edition) p. 442:

> "The verdict must be responsive to issues and the nature of the action, and should not conform to an improper prayer in the declaration of complaint. It is not responsive, if for an amount other than that recoverable, if any thing is recoverable, or if it finds upon only part of the issues submitted, or if it leaves the case undecided as to some of the subjects of the action * * * The verdict must be certain, enough to enable the court to reduce it to form, if informal, and consistent in its several awards and findings * * * The verdict should follow and conform to the instructions, even if erroneous, and disregard

of them is ground for a new trial or reversal, unless it can be said that no prejudice resulted."

Thus in *East St. Louis Cotton Oil Co. v. Skinner Brothers Mfg. Co.* (C.C.A. 8th, 1918) 249 Fed. 439, where defendant counterclaimed in an action for material furnished and labor performed, asserting plaintiff's breach of an alleged contract to install a ventilating system for an agreed price, while plaintiff asserted that no contract price had been fixed, a verdict for plaintiff, which also awarded damages to defendant on its counterclaim, was held inconsistent with itself and could not sustain a judgment based on the verdict. The verdict returned by the jury read:

"We, the jury in the above-entitled cause, find the issues herein joined under the petition of plaintiff in favor of said plaintiff, and we find that defendant is indebted to plaintiff by reason of the account stated in said petition in the sum of forty-five hundred and ninety-four and 79/100 ($4,594.79) dollars. We further find the issues herein joined under the counterclaim of defendant in favor of said defendant, and we assess the damages of defendant under said counterclaim at the sum of one thousand and 00/100 dollars."

The Court declared, at page 442:

"The question as to whether the verdict supports the judgment is a question of law, which appears on the face of the record without a bill of exceptions. Such questions may be assigned as ground of reversal, although no exception is taken."

The verdicts in the instant case on appeal do not support the judgment. The two verdicts rendered were (R. 767-768):

> "Verdict No. I. We, the jury, duly sworn and impanelled to try the above-entitled cause, do find for the plaintiff and against the defendant, and do further find that the plaintiff is entitled to recover of and from the defendant the sum of fourteen thousand two hundred fifty and 82/100 ($14,250.82) dollars, together with interest thereon at the rate of six per cent (6%) per annum, from the 1st day of March, 1951.
>
> Verdict No. II. We, the jury, duly sworn and impanelled to try the above-entitled cause do find for the defendant and against the plaintiff, and we do further find that the defendant is entitled to recover of and from the defendant the sum of eight thousand one hundred thirty-one and 63/100 ($8,131.63) dollars, together with interest thereon at the rate of six per cent (6%) per annum from the 1st day of March 1951."

These verdicts were rendered in direct contravention of the instructions of the trial judge, who instructed the jury (R. 752 and 760):

> "* * * if you find from the evidence that the defendant is entitled to recover from the plaintiff damages arising from the failure of plaintiff to do the work and furnish the materials specified in the contracts, whether written or oral, then such damages should be deducted from any amount which you might find otherwise due to the plaintiff, and if those damages exceed the

amount, if any, which you might find would otherwise be due the plaintiff, a verdict should be rendered in favor of the defendant for the balance * * * If you find for the plaintiff and against the defendant you will insert in the verdict which has been prepared for that contingency and which is marked 'Verdict No. I' the sum which you find that the plaintiff is entitled to recover of and from the defendant, and your foreman will thereupon date and sign that verdict and you will return the same into Court as your verdict.

Similarly, if you find that the plaintiff is not entitled to recover any sum whatsoever against the defendant and that the defendant is entitled to recover from the plaintiff, you will insert in the form of the verdict which has been prepared for that contingency and which is marked 'Verdict No. 2' the amount which you find the defendant is entitled to recover of and from the plaintiff, and your foreman will thereupon date and sign that verdict and you will return the same into court as your verdict."

The trial Court instructed that one verdict could be returned instead of two, two were returned in violation of the instructions. The instructions "constituted the law of the trial. The jurors were bound to follow them". *American R. Co. of Porto Rico v. Santiago,* 9 F. (2d) 753 at 757 (C.C.A. 1st, 1926): 9 Cyclopedia of Federal Procedure (3rd Edition) 442, ***supra.***

V.

THAT THE COURT ERRED IN ADMITTING OVER APPELLANT'S OBJECTION, IN EVIDENCE, APPELLEE'S EXHIBIT "T" FOR THE REASON THAT THE SAID EXHIBIT WAS NOT PART OF THE CONTRACT BETWEEN THE PARTIES AND WAS INCOMPETENT AND PREJUDICIAL.

Appellee introduced, over appellant's objection, into evidence Defendant's Exhibit "T" (R. 715) which was structural steel plan indicated that a marquee built by the appellant as an extra, had been pencilled in by a Mr. Anderson, the architect and engineer for appellee. There was no evidence that the appellant had ever seen this plan, or that it was part of any plan on which the appellant based his bid (R. 726). The record reads (R. 715):

> "Mr. Arnell. We wish to renew our objection on the grounds that it is incompetent. There is no showing that Mr. Gothberg ever saw it, or that it was a part of any plans upon which he based his bid.
>
> Court. The objection is sustained.
>
> Mr. Bell. Exception.
>
> Court. The exception is noted. I think the ruling was erroneous. It was shown to Mr. Anderson and he knew about it when he drew the plans and specifications, and it may conceivably have some value. The objection is overruled, and it may be admitted."

The record indicated that Mr. Anderson was not an employee of appellant, but was hired by appellee, Carr. Mr. Anderson had previously testified that (R. 613):

"A. I was employed by Mr. Carr to design the garage, or I should say, complete the design of a garage that he was building on Fifth Avenue and Denali Street. It consisted actually of two parts—one part was for a change in the foundation that had already been built, and the second part was for completion of the structure."

And that (R. 615):

"Q. How long, Mr. Anderson, did you serve as architect, or inspector, of this job for Mr. Carr?

A. I was working as Mr. Carr's representative up until about January 20, 1951."

And that (R. 617):

"the construction of the marquee was extra work or a 'change' in addition to the contract.

* * * there is another change. We provided for a second window and there is a door in that area. In order to make the wall structurally sound, it was necessary to pour concrete columns and a spandrel beam to hold up the blocks above it and also to hold the marquee."

The appellee, Carr, had already testified that he had hired and paid Mr. Anderson to prepare to design the garage and draw the plans (R. 204):

"Q. Then did you employ Mr. Anderson on the recommendation of Mr. Gothberg?

A. Well, there is a Mr. Anderson—and then there is a Mr. Smith in there too, the two together—but Lorn Anderson was a registered

engineer, and Mr. Smith—I don't know—but Smith did the most of the talking."

And (R. 205):

"Q. How much did you pay this engineer to draw those plans?

A. It cost me $2,700.00—and my understanding was it would be between five and six hundred dollars—I paid for it.

Q. And when you got the bill it was for $2,700.00?

A. Better than twenty-seven hundred and some odd dollars."

It is obvious from the foregoing testimony that Mr. Anderson was the agent and employee of appellee, Carr, (by Carr's own admission) and any agreement concerning an amendment of the plans, as indicated by Exhibit "T" was hearsay and an inadmissible self-serving declaration. In *Perkins v. Haskell,* 31 F. (2d) 53, (C.C.A. 3rd 1929) dismissing appeal (D.C.), *Haskell v. Perkins,* 28 F. (2d) 222, and certiorari denied, 49 S.Ct. 513, 279 U.S. 872, 72 L.Ed. 1007, the Court declared, at page 64:

"What the plaintiff said and wrote, not to Duke, but to the persons engaged in making the investigation, and, indeed, in several instances, what he said to strangers, were inadmissible under the familiar rules against self-serving declarations. What the several investigators said and wrote to the plaintiff and to one another, and what they did in the progress of their employment, admitted in evidence to prove the character and terms of

an alleged contract between Haskell and Duke, were not valid evidence of such contract, and did not bind Duke, in the absence of evidence showing they were speaking and acting as his agents in respect to the making of a contract. Witnesses not present when it is alleged a contract was made on July 18 manifestly cannot be heard to say what contract, if any, was then made in their absence; nor can their later words and acts unless shown to have been authorized by Duke, vary the terms of the undertaking then reached, and develop it into a full-grown contract embodying terms not then broached. It was, we think, mainly by this evidence, inadmissible in the first instance, and when submitted, given a value it did not possess, that the jury was moved to its verdict."

In admitting, over appellant's objection, Appellee's Exhibit "T", the trial Court could have only admitted the exhibit on the theory that Mr. Anderson was the agent of appellant, and that acceptance of the plan by Mr. Anderson bound appellant. No proof of such agency was adduced. In fact, it was necessary to adduce more than mere proof of agency. It was necessary to show that Anderson had general authority as such agent to make substantial changes in the plans. *Gratz v. McKee,* 9 F. (2d) 593 (C.C.A. 8th 1925).

VI.

THAT THE COURT ERRED IN PERMITTING, OVER APPELLANT'S OBJECTION, THE APPELLEE AND HIS WITNESSES TO TESTIFY CONTRADICTORY TO THE TERMS OF THE WRITTEN CONTRACT BETWEEN THE PARTIES.

The appellee introduced Victor C. Rivers as a witness who identified a report prepared by the witness. The report was an "analysis of the plans and specifications and contract documents and appraisal of the building" which was the subject matter of this action (R. 498). Appellant objected to it, initially, on the grounds that it was not the best evidence (R. 499). The testimony of the witness, Rivers, who was qualified as an expert witness in the field of engineering was not limited to testimony of his findings on inspection of the building after the controversy arose. The witness testified that certain work actually performed by the appellant, based upon witness' examination of the contract, was included in the terms of the contract and was not properly chargeable as "extras". The attempt to indicate by the witness' testimony the "cost" of performing certain work contracted for, was, initially, precluded by the trial Court. The Court said (R. 558):

> "Court. The objection is sustained. There is a contract for $2,542.00 to do that precise work * * *"

Appellee asserted that he desired the witness to prove by the expert that the work was included in the contract and was only worth at most $400.00 (R. 558, 560).

Appellant objected saying that (R. 559):

> Mr. Arnell. I propose that that is incompetent for the reason that the contract is in evidence. This man is not qualified to testify as to what the terms of that contract were intended to include. The contract before the court, also the specifications, state that the footings and the foundation in the boiler room was in at the time this contract was signed on September 19, 1950."

But the trial Court finally admitted the testimony (R. 563):

> "Q. Now, Mr. Rivers, as an engineer, if the second contract provided to build the building and everything covered by the plans and specifications, would that include the stairway and stairwell into the boiler room?
>
> Mr. Arnell. If your honor please, I wish to interpose an objection on the grounds that the question is incompetent. Although Mr. Rivers is an expert, he can't answer upon the basis of an estimation, or guess, as to what this contract did or did not provide. Therefore, I think the question is improper.
>
> Court. He is testifying as an expert upon the plans and specifications. I think the question may be answered. The objection is overruled.
>
> A. Inasmuch as this drawing is a part of the contract documents, and the details and general information as shown here, I would interpret the plans to mean that the contractor was obligated to perform the work.
>
> Q. As a part of the contract, Mr. Rivers?
>
> A. As a part of the contract.

Q. Then if he were obligated to perform it as a part of the contract, it would not be a proper extra would it?

A. Definitely no, unless there was some supplemental or outside agreement to that effect."

The impress of the testimony was sufficient to make the jurors question the witness (R. 565, 566, 567).

The trial Court in accepting the expert testimony of the witness, who was qualified as an engineer, permitted the witness to usurp the function of the Court and jury in determining what the contract consisted of. The error was a grave one because the witness' testimony had apparently impressed the jurors.

It was said, in one case:

"In addition, however, and apparently as a substitute for the missing witnesses, there was called as an expert witness a gentleman whose qualifications are beyond question, but who in response to hypothetical questions gave answers which, if allowable, left nothing for this court to decide. This goes far beyond the province of an expert, and is in fact usurping the province of the court, and cannot be allowed. Castner Electrolytic Alkali Company v. Davies (C.C.A.) 154 F 938; United States v. George A. Fuller Company, Inc. (D.C.) 300 F 206; Hunt v. Kile (C.C.A.) 98 F 59."

Campbell J., in *The Domira,* (D.C.E.D., N.Y. 1931), 49 F. (2d) 324 at 328, aff'd 56 F. (2d) 585 (C.C.A. 2d).

Even if it were assumed that the testimony of the witness, Rivers, was not in violation of the parol

evidence rule, none-the-less, his testimony that appellant was "obligated to perform the work" as "part of the contract" and receive no extra compensation for an "extra" violated the general rule that a witness, even if qualified to speak and render an opinion, should not render an opinion on the exact and ultimate issue which is for determination of the Court and jury. In *Hamilton v. United States,* 73 F. (2d) 357 (C.C.A. 5th, 1934) at page 358, the Court said of expert testimony:

> "Moreover, the physicians were asked the exact and entire question which the pleadings put to the jury. They might as well have been asked whether in their opinion Hamilton ought to win the case."

In the *Hamilton* case, the question put to the physicians was whether the insured was totally and permanently disabled within the meaning of the insurance. In the instant case, the witness, Rivers, was asked whether certain work was an obligation under the contract. The question permitted the witness to settle these questions of law for himself, and applying this law to his interpretation of the facts, to try the very question for which the Court sat. *United States v. Sauls,* 65 F. (2d) 886 (C.C.A. 4th 1933).

This testimony of the witness, Rivers, in substance established a new contract before the Court. The trial Court had declared the contract complete in itself. There was no contention that there was fraud, mistake, or wanton or arbitrary action on the

part of appellant. In such a case, the execution of a written contract, even though voluminous, supersedes all oral negotiations concerning its terms, and the whole engagement of the parties is presumed to have been reduced to writing. *Rajotte-Winters, Inc. v. Whitney Co.,* 2 F. (2d) 801 (C.C.A. 9th 1924). Even the testimony of an engineer, as in *Gammino v. Inhabitants of Town of Dedham,* 164 Fed. 593 (C.C.A. 1st, 1908), that it is customary when certain obstructions are "not shown on the plans or indicated as uncertain, to treat and pay for any work done thereon as extra work" is improper as contradictory of the written contract in evidence and is in violation of the rule set forth in *United States v. Fidelity and Deposit Co. of Maryland,* 152 Fed. 596 (C.C.A. (2d) 1907), at 599:

> "The rule is elementary that, where the parties have deliberately put their engagements into writing in such terms as to import a legal obligation, without any uncertainty as to the object or extent of such engagements, the writing is presumed to contain the entire contract and all the prior and contemporaneous negotiations are merged therein, and cannot be shown by parol evidence. The writing, it is true, may be read by the light of surrounding circumstances in order to more perfectly understand the intent and meaning of the parties; but, as they have constituted it to be the only and final expression of their meaning, no words can be added to it, or others substituted in place of words it already contains. The rule which precludes a resort to parol evidence to modify the terms of a written

contract in particulars, in respect to which the language is unequivocal, applies as well to the implied as to the expressed conditions. Indeed, that which is a part by implication is as much a part of the contract as though it had been fully expressed in its words. These familiar rules control the present question."

VII.

THAT THE COURT, TO THE APPELLANT'S PREJUDICE, ERRED IN EXCLUDING APPELLANT'S EVIDENCE OF CONSTRUCTION TRADE CUSTOMS AND PRACTICES RELATING TO APPELLEE'S ACCEPTANCE OF THE BUILDING BY USING AND OCCUPYING THE SAME.

Wigmore declares that:

"Where the parties have not intended to make the document embody the entire transaction upon a particular topic, its terms may be as well supplied by implied intrinsic agreement. In other words, that usage or custom of a trade or locality, which would otherwise by implication form a part of the transaction, will equally form a part when the transaction has been embodied in a document, provided the documents are not intended to cover the topic affected by the custom."

IX Wigmore On Evidence (3rd Edition) No. 2440, p. 127.

"The principle is otherwise declared in Brown v. Byrne, 3 E. & B. 703, (1854): 'In all contracts, as to the subject matter of which known usages prevail, parties are found to proceed with the tacit assumption of these usages; they commonly reduce into writing the special particulars of their

> agreement, but omit to specify these known usages, which are included, however, as of course, by mutual understanding of; evidence therefore of such incidents are receivable. The contract in truth is partly express and in writing, partly implied or understood and unwritten."

In the instant case on appeal the appellant offered to introduce evidence of a general custom and usage existing in the building trade indicating the prevailing usage in the area in trade that an owner occupying a building being finished by the contractor accepts the building "as is" and waives any objections as to non-compliance with the building contract. Appellant testified that the building which was the subject of the contract was 99% completed when appellee moved in (R. 707). Appellant then testified that he had been in the contracting business since 1925 and engaged in such business in Alaska since 1945. Appellant was then asked (R. 709):

> "Q. Are you familiar, Mr. Gothberg, with the customs and common usages that are recognized in the contract trade, where an owner occupies a building that is in the process of construction or being finished?
>
> A. I certainly am."

Upon objection the Court ruled:

> "Court. I think the practices could not be binding upon the defendant unless it is shown that the defendant had knowledge of the practice. To say that contractors have a practice is not sufficient, and the objection is sustained."

But the Court failed to determine whether the usage was so notorious and uniform that the knowledge of such usage would be imputed to appellee. One who seeks to avoid the effect of a notorious and uniform usage of trade must show that he was ignorant of it. *Robertson v. National Steamship Co., Limited,* 34 N.E. 1053 (N.Y. 1893); *Johnson v. De-Peyster,* 50 N.Y. 666.

Dated, Anchorage, Alaska,
February 24, 1954.

Respectfully submitted,
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